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Marchand: The Politics of Privacy, Computers and Criminal Justice Records

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BOOK REVIEW

THE POLITICS OF PRIVACY, COMPUTERS, AND CRIMINAL JUSTICE RECORDS. By Donald A. Marchand.* Arlington, Virginia: Information Resources Press. 1980. Pp. xvi, 431.

*Reviewed by Betty W. Taylor***

Automation in data retrieval is expanding man's access to information at a tremendous pace. The success of the space program stimulated application of scientific procedures to the transmission of non-scientific data, and spurred experimentation in every discipline, including law. The American Bar Association, a frontrunner among legal institutions in testing automation, sponsored a National Conference on Law and Electronics in 1960, and exhibited the legal research capabilities of computers at its Annual Convention the same year. Following the lead of the ABA, the University of Pittsburgh Health Law Center reported the first successful computerized statutory search efforts. Concurrently, the private sector was gearing up to offer commercial legal search services. Governmental agencies interested in the new technology explored the possibility of implementing automated data systems while state legislative bodies commenced statute and bill status reporting services.

Not surprising, then, was the keen interest of law enforcement officials in converting manual records into automated systems, to take advantage of expanded record capabilities, shared data on a nationwide scale, and increased speed in data transmission. However, unlike other developing legal information systems, law enforcement records contain sensitive data which, as a matter of policy, should not be available to the public. Professor Marchand's book focuses entirely upon the automation of criminal records, analyzes the negative impact upon the private and public sector, and describes attempts to manage and control information systems.

Over a period of six years Donald Marchand studied the relationship of computer technology as applied to criminal justice information systems, and the resultant social costs (uncompensated costs) to "individuals or groups in society, arising from the activities of public organizations that result in significant infringements or denials of individual rights, such as privacy and due process, or that restrict social, political, or economic opportunities."[1] The author is well qualified to write on the subject, having conducted extensive empirical research for a dissertation, and having been appointed to the Federal Data Processing Reorganization Study of the President's Reorganization Project.

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1. D. MARCHAND, THE POLITICS OF PRIVACY, COMPUTERS, AND CRIMINAL JUSTICE RECORDS, ix (1980).

In addition, Marchand was the principal contractor for the history, use, and social impact studies on the Assessment of the National Crime Information Center and the Computerized Criminal History Program.

The first segment of the book discusses the assessment and control of technology and the problems raised by public choices. Primary consequences of introducing new technology usually can be anticipated, but frequently, secondary consequences which are totally unanticipated arise. Advantages in automating a system generally are easily recognized and fairly obvious whereas the disadvantages are often unidentified, overlooked, or are distasteful and suppressed. A study of technology assessment, therefore, begins with current policy-making processes and the capabilities of responding to problems brought about by the new technology. The objectives, as stated by the author, are first, to define social costs, that is, uncompensated costs, in relation to information problems and collective action; and second, to explore "the dynamics of information production and use, [as applied to criminal justice information], relative to the social costs of technological innovations and the politics of public policy formation."[2]

As computers became more sophisticated with the advent of mass storage accessible by terminals throughout the nation and the world, attention focused on the consequences of information production and use. Information in the public domain, such as court opinions and statutes, attracted less attention than the accumulation of criminal information which followed individuals across state boundaries and beyond governmental law enforcement and criminal justice agencies. The realization that uncontrolled use of personal criminal data could expose persons to far-reaching, unanticipated consequences propelled a movement in the 1960s for protection of the right to privacy.

The political processes of policy-formulation were strained to cope with the negative aspects of technological innovation in criminal justice information production. This study analyzes the interaction of technology and politics and defines the social costs borne by individuals and public organizations when confronted by privacy considerations.

The second segment of the book is devoted to criminal justice information systems and the reform of the criminal justice system. In 1965 President Lyndon B. Johnson established the President's Commission on Law Enforcement and Administration of Justice. A report, published two years later, identified three problems in criminal justice administration: lack of coordination, the overburdened process, and inadequate information about the system. Modern technological methods were perceived as a solution to some of these problems. Federal legislation, especially the Law Enforcement Assistance Act of 1965 (LEAA) and the Omnibus Crime Control and Safe Streets Act of 1968, gave impetus by way of federal monies for projects "to improve law enforcement and correctional personnel, to increase the ability of state and local agencies to protect persons and property from lawlessness, and to instill greater public respect for the law."[3] The latter act was the first federal attempt to provide funds for reform and modernization of the criminal justice system.

2. *Id.* at 8.
3. *Id.* at 60.

As LEAA received grant requests from various sources, a patchwork evolved with considerable local independence and consequent incompatibility within and among states. The need for a coordinating body was evident. In order to meet that need, Project Search was created to demonstrate that a computerized criminal justice file could be created and standardized, and to computerize statistical information as a basis for meaningful research. Project Search continued in existence from 1969 through 1974 when it became Search Group, Inc., a private, nonprofit corporation, which continues to aid state and local governments in the application of technology to criminal justice administration.

One of the early grants made by the Office of Law Enforcement Assistance was to the Federal Bureau of Investigation to develop the National Crime Information Center (NCIC):

> The NCIC system is a computerized, national law enforcement system that links more than 4,000 police agencies through the use of some 104 terminals in the 50 states, Washington, D.C. and Canada. . . . [The] nine basic record files in the NCIC computer system [consist of: stolen motor vehicles, stolen articles, stolen, missing, or recovered guns, stolen license plates, wanted persons, stolen securities, stolen boats, Computerized Criminal History, and Missing persons.] In 1978, there were more than 6 million records computerized in the NCIC system. . . . By January 1978, these records were accessed an average 256,546 times daily. . . .[4]

The Computerized Criminal History file consists of arrest records going into the FBI primarily from state and local agencies. These records contain the complete history of each individual from arrest through the official criminal justice system process, including court decisions, probation departments, and incarceration.[5] The problems resulting from conversion of manual records into a data base were profuse. Little attempt to complete missing information, verify data, or purge records was made at the outset, leading to action by legislative and executive agencies to protect individuals from the detrimental costs incurred because of loss of benefits resulting from inadequate or inaccurate criminal information.

The number of states having automated, state-level criminal justice information systems jumped from 10 in 1968 to 47 in 1972. At that time 400 systems were operational or in planning stages. More than half were planned for local-level systems. A later survey in 1976 identified 683 systems in 549 jurisdictions.[6] In the interest of coordinating state efforts that would be compatible with an integrated national criminal justice information system, LEAA required that funding to states be tied to a master plan developed by each state to assure a project design within the goal for uniformity of information as well as protection of individuals.

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4. *Id.* at 66-67.

5. At present, the indexing system provides basic criminal information. Further information must be sought from the inputting state. *See id.* at 133-34.

6. *Id.* at 74.

Obviously there was a wealth of information in these records about a large segment of the population. The emphasis at the beginning was on converting the manual records into the automated systems. Gradually, an awareness of the impact of these records upon individuals began to emerge. Because few controls governed access to the records, individuals were denied benefits and services of our society. Employers queried data banks to determine if arrest and/or conviction records existed for prospective employees. A study revealed that most employers would not hire individuals with arrest records regardless of whether the persons were subsequently convicted on charges stemming from the arrests. Occupational licenses were often denied based on the existence of the criminal information record evidencing lack of "good moral character."[7]

Studies also indicated that individuals with arrest or conviction records were denied "life insurance, loans, property insurance, and retail credit . . . dependent on investigations performed by credit agencies."[8] The author emphasizes that these persons as a group are ineffective lobbyists for improvements in the system because they do not want to be identified as part of the group. The cause is neither popular, nor one individuals within the group wish to espouse. Therefore, protection for these individuals must come from outside the population affected in order to reduce the social costs for individuals and society. The American Civil Liberties Union, the Lawyer's Committee for Civil Rights Under Law, the Scientist's Institute for Public Information and the news media serve effectively as lobbyists for this group of individuals.

Safeguarding privacy and security became a public issue, but no concensus emerged as to a means of accomplishing this objective. The struggle for control, management, and regulation of the use of the information contained in the national system continues unresolved. Legislative activity since 1965 chipped away at the problem, attempting to avoid a federally controlled criminal information system, and regulating access and use of the information. A Model State Act for Criminal Offender Record Information drafted by Project Search encourages uniformity among the states, as does the Model Administrative Regulations for Criminal Offender Record Information. The Model Acts provide a general framework for the states in drafting legislation but do not detail specifics of privacy and security control. Few states have adopted the Acts. The Model Regulations require that personnel handling the criminal information systems be educated in the use and control of the systems, that the computer be dedicated to the criminal justice information system or, if that is impossible, that the information be stored in a portion of the computer under the management of a criminal justice agency. The records may not include a reference to intelligence files existing on an individual. In the attempt to create records that conform to a national standard, the regulations provide for purging and closing records.[9]

In establishing the Comprehensive Data System (CDS) program in 1972, LEAA tied strings to grants to states for criminal justice data-collection

7. *Id.* at 98.

8. *Id.* at 99. Other studies pointed out opportunities denied individuals with records in the criminal information system in housing, education and military service. *Id.*

9. *Id.* at 153.

systems by requiring state minimum development and security and privacy standards. By 1974 LEAA had spent $300 million on state and local criminal justice information systems[10] and most states had developed or expressed an interest in CDS programs. Half the states had actually submitted plans.

The three branches of federal government have intervened in the consideration of a national criminal justice information policy. The author sets out in detail the legislative initiatives through Congressional hearings on proposed legislation, and distinguishes between different bills offering solutions, judicial decisions, and executive actions which have impacted upon the policy and have affected the social costs. State and local reactions are also documented.

Florida's activity in this area is cited frequently in the book. The State enacted the Department of Law Enforcement Act of 1974,[11] with extensive provisions incorporating the concepts, standards, and regulations suggested by national organizations and agencies, as discussed above. The Division of Criminal Justice Information Systems was created within the Department. The Act confers criminal reports duties[12] on the Division which bring Florida into compatibility with the national criminal information network. In 1978 the Florida Council on Criminal Justice[13] was created to function as the executive agency responsible for the state-wide plan. The Council's duties consist of advising and assisting the Governor, establishing and implementing goals, priorities and standards for the reduction of crime and improvement of the administration of justice, recommending legislation and other similar duties.[14] A Comprehensive Statewide Action Plan has been drafted for Florida as a basis for implementation as well as for receiving LEAA funds.

The Act itself does not address the security and privacy problems as defined in the book but these problems will, no doubt, be covered by regulations of the Council. The privacy issue was debated in the Legislature during the 1980 session as a result of the introduction of a joint resolution to create Section 23 of Article I of the State Constitution relating to the right of privacy. Representative Jon Mills proposed the following Constitutional Right of Privacy: [e]very natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law. . . ."[15] Representative Mills states that "[i]ncreased government information gathering and computer utilization have endangered citizens personal privacy and individuality. A constitutional amendment would give the individual authority to assert his or her right to privacy."[16] The major focus is "[t]o protect the individual against

10. *Id.* at 165.
11. 1974 Fla. Laws, ch. 74-943.
12. FLA. STAT. §943.05 (1974).
13. FLA. STAT. §23.152 (1978). The original Department of Law Enforcement Act of 1974, 1974 Fla. Laws, ch. 74-943, created the Criminal Justice Information Systems Council. It has failed to meet, however, and therefore the Council will be abolished in October, 1981.
14. FLA. STAT. §23.154 (1978).
15. Fla. C.S. for H.J.R. 387 (1980).
16. J. Mills Rep., NEWS RELEASE 1 (undated).

governments gathering of data and possible abuses of information collection."[17] This amendment would provide Florida citizens with the same protections granted by the United States Constitution. Since the amendment is sufficiently broad, the criminal justice information systems would be subject to its provisions and would protect Florida citizens in accordance with the Supreme Court decision in *Katz v. United States.*[18] "[T]he protection of a person's general right to privacy — his right to be let alone by other people — is, like the protection of his property and his very life, left largely up to the law of the individual states."[19]

The Center for Governmental Responsibility, located at the Holland Law Center, University of Florida, is planning to undertake an evaluation of national information systems, both public and private. One aspect of the program will concentrate on the use by law enforcement officials and other members of the criminal justice community of the National Crime Information Center (NCIC) and Computerized Criminal History files. Substantial legal and policy questions are posed by these criminal justice systems. Some of these questions are raised by Marchand throughout his book. First efforts of the program will center upon Florida, expanding nationally and internationally.

Donald Marchand has written an excellent, well documented study of a critical problem in the field of automation. Extensive footnotes and a 45-page bibliography offer a wealth of publications that supplement and support his study. The technique of outlining each new chapter, tying it to previous and forthcoming chapters, assists the reader in relating the contents to the overall objective. That Marchand is an authority on this subject is evident from the descriptions, analyses, and recommendations that are proffered on the various aspects of criminal justice information systems. Intricacies of politics, automation, individual rights, and social costs are successfully interwoven into this study for assistance in understanding the complications of the technology when applied to sensitive data. Since there is, as yet, no definitive answer resolving the dilemma of access to criminal data for necessary law enforcement purposes, controlling accessibility when so many are skilled in computer techniques, assuring individuals of the accuracy of their records and guaranteeing privacy remain vital factors to be considered in determining the propriety of applying technological innovations to criminal justice information productions. The book fulfills an important function in identifying these problems, describing attempts to deal with them, and offering alternatives to assist with future studies and official action. The social costs for both individuals and the public dramatically emphasize the necessity for careful, thoughtful evaluation of computer systems and their impact upon society in terms of tangible as well as intangible costs.

17. *Id.*
18. 389 U.S. 347 (1967).
19. *Id.* at 350-51.

ZONING: THE LAW IN FLORIDA. By Julian Conrad Juergensmeyer* & James Bryce Wadley.** Norcross, Georgia: The Harrison Company. 1980. Pp. xxiii, 402, index; 3 vol. $59.85.

*Reviewed by Robert W. Martin, Jr.****

In the preface to their very ambitious three volume treatise on zoning, authors Julian C. Juergensmeyer and James B. Wadley state "[b]oth reading and writing a zoning book requires considerable courage."[1] If courage on the part of the authors is a necessary ingredient of a first-rate book on zoning, Juergensmeyer and Wadley have no need to visit the Wizard of Oz. Their work is destined to become a standard reference tool in the law libraries of all Florida lawyers who work in the areas of zoning or land use planning.[2]

As for the courage required of the readers of these volumes, it requires more courage to practice zoning law in Florida and not read portions of the treatise than to do so. After reviewing these three volumes, it does not seem hyperbolic to compare them with Professor Kenneth Culp Davis' multi-volume work on administrative law[3] in terms of coverage and readability. The analogy is also very appropriate because an attorney doing research in administrative law or zoning and land use planning law, would not want to consult only Davis or only Juergensmeyer and Wadley, as the case may be. Administrative law and zoning and land use planning law change too rapidly for that to be a comfortable choice. However, the Juergensmeyer and Wadley treatise shares that same quality of timelessness possessed by the Davis treatise.

In effect, Juergensmeyer and Wadley have combined the best of both worlds. The extensive footnotes to current cases and secondary material provide a currency not easily achieved in a book on zoning. If Juergensmeyer and Wadley follow the lead of their other works,[4] they will continuously update their sources and thereby insure the continued currency of their treatise. At the same time, no matter how many new cases are decided and no matter what

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1. *Preface* to 1 J. JUERGENSMEYER & J. WADLEY, ZONING: THE LAW IN FLORIDA (1980) [hereinafter cited as ZONING: THE LAW IN FLORIDA].

2. The authors state that "'zoning' and 'land use control' are not synonymous. . . . Nonetheless, the terms zoning and land use control are sometimes used interchangeably—especially in those Florida jurisdictions whose only or principal land use control device is zoning. Even though it must be granted that the definitional boundaries between zoning and other land use planning and control devices are becoming less fixed in Florida, the separation is essential since on many important points 'zoning' in Florida is governed by different judicial case law principles and attitudes and by different Florida statutory law than other land use devices." ZONING: THE LAW IN FLORIDA, *supra* note 1, §1.1. (footnotes omitted).

3. K. DAVIS, ADMINISTRATIVE LAW TREATISE (2d ed. 1978).

4. J. JUERGENSMEYER & J. WADLEY, FLORIDA LAND USE RESTRICTIONS (1976) [hereinafter cited as FLORIDA LAND USE RESTRICTIONS].